2013 IL App (1st) 130788-U

FIRST DIVISION
November 25, 2013

No. 1-13-0788

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROY CORRIE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	
	)	No. 12 M1 116428
JAMES MACCHITELLI,	)	
	)	Honorable
Defendant-Appellee	)	Rhoda Davis Sweeney,
	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Hoffman and Cunningham concur in the judgment.

O R D E R

¶ 1 *Held*: This court could not evaluate plaintiff's claims that evidence was erroneously excluded because the trial transcript was not contained in the record on appeal. The circuit court did not err in denying plaintiff's request for a new judge.

¶ 2 Following a bench trial, the circuit court entered judgment in favor of defendant on plaintiff's claims of legal malpractice and breach of contract filed against his former attorney. On appeal, plaintiff argues that the circuit court erred in excluding evidence that he presented at

trial. He also argues that the circuit court was biased against him and erred in denying his request for a new judge. We affirm.

¶ 3 BACKGROUND

¶ 4 This appeal follows from the circuit court's entry of judgment against plaintiff Roy Corrie, who appeared *pro se* in the court below. Plaintiff filed a complaint against defendant James Macchitelli, his former attorney. He made a number of allegations that were critical of defendant's legal representation. Defendant filed a motion to dismiss the complaint on the ground that it did not specify the legal basis for plaintiff's claims for monetary relief. Plaintiff later filed a response to the motion to dismiss and a motion for leave to file an amended complaint.[1]

¶ 5 Plaintiff made the following allegations in his amended complaint. In August of 2010, he sought legal assistance to challenge the actions of the State of Illinois and the Illinois Gaming Board. He alleged that he invented a video gaming terminal and proposed to sell it to the State and the Board for use in conjunction with the Video Gaming Act (Act) (230 ILCS 40/1 *et seq*. (West 2010)). However, they "refused" to review his proposal or the machine.

¶ 6 On September 15, 2010, plaintiff hired defendant as his attorney and paid him a $5,000 retainer. Plaintiff alleged that "it was clearly understood that this money was for the (1) filing of the complaint with in [*sic*] two weeks and to finish the case from beginning to end. I wanted to

[1] The record on appeal does not include the court's ruling on plaintiff's or defendant's motions. However, the record indicates that the case went to trial. For the purposes of this appeal, we will assume that defendant's motion to dismiss was denied and plaintiff's motion for leave to file an amended complaint was granted.

use the upcoming election to get the case going before the November election." He alleged that defendant "confirmed such agreement from correspondence [*sic*] after this meeting." Plaintiff also alleged that he was paying defendant to ask the Governor and the Board on his behalf six questions that the Board would not answer at its public meetings. He also alleged that defendant was supposed to have sent him a fee agreement, but that defendant did not do so.

¶ 7 Plaintiff alleged that as the end of September approached, defendant "was harder and harder to reach." He alleged that he attempted to reach defendant "approximately 50 times" and defendant finally returned his call in mid-November.

¶ 8 At that time, defendant told plaintiff that he had prepared a complaint naming the Governor of Illinois and members of the Board as defendants. It was a complaint for declaratory judgment, seeking to have the Act declared unconstitutional on the grounds that it was prohibited special legislation and it violated the due process clause of the Illinois constitution. They met a few days later to discuss it. Plaintiff alleged that he filed the complaint in the circuit court on November 16, 2010.

¶ 9 Over the next few months, plaintiff called defendant "on numerous occasions and rarely was able to reach him." Defendant told him that the Governor and the Board had gotten the case continued. Plaintiff alleged that in January of 2011, he learned that the Governor and the Board filed a motion to dismiss the complaint, "and thus [the Governor and the Board] had not moved for a continuance but moved to dismiss the case."

¶ 10 At about the same time, plaintiff also learned that another case challenging the constitutionality of the Act was pending "at the appellate level" and likely going to the Illinois

Supreme Court. In light of that, defendant told plaintiff that the hearing on the motion to dismiss his complaint would be postponed. The supreme court eventually upheld the Act in the other case and plaintiff and defendant "had to determine if [they] should continue." They proceeded on the original complaint.

¶ 11 The hearing on the motion to dismiss plaintiff's complaint was held on September 26, 2011, at 10:00 a.m. Plaintiff alleged that defendant arrived twenty minutes late and, as a result, the case was continued again. Plaintiff and defendant spoke outside the courtroom and plaintiff told defendant "his showing up late was unacceptable." He told defendant to wait in the hallway while he "asked the court clerk why the continuance had been granted." When plaintiff returned, defendant was gone, but told plaintiff's friend to call him.

¶ 12 Plaintiff alleged that he tried calling defendant over the next week, but could not reach him. Plaintiff "finally had to track him down at his house" one evening. He claimed the lights were on and he could hear the television, but no one answered the door. He arrived at defendant's house the next morning at 7 a.m. while he and his wife were taking out the trash. Defendant "indicated he would set up a meeting to have himself removed from the case." Plaintiff alleged that he filed the motion to withdraw on October 1, 2011. About a week later, plaintiff appeared *pro se* in his case against the Governor and the Board and argued the motion to dismiss. He alleged that he filed a supplemental brief in that matter following the hearing.

¶ 13 Plaintiff first alleged a claim for fraud. He asserted that defendant: (1) promised to file the complaint within two weeks of receiving payment; (2) promised that plaintiff would have his "day in court" to ask the Governor "why he had ignored [plaintiff's] requests"; and (3) did not

disclose that a motion to dismiss was pending, which concealed defendant's errors regarding the initial filing of the complaint. Plaintiff asserted that defendant intended for him to rely on these statements to his detriment and that he did so.

¶ 14 Plaintiff also alleged a claim for legal malpractice. He alleged that defendant referenced the wrong version of the challenged legislation in the underlying lawsuit and that defendant never provided him with the motion to dismiss. As a result, he alleged that he had a "small if any chance at all in prevailing" in the underlying action.

¶ 15 Plaintiff alleged a claim of negligent misrepresentation. He stated that defendant misrepresented "various aspects of the case which if [he] had been aware would have been able to make a more intelligent decision [*sic*]" in the underlying action.

¶ 16 Plaintiff also alleged a breach of contract claim. He stated that "an offer was made by [him] and was accepted by the defendant." Specifically, he alleged: (1) defendant agreed to file the complaint within two weeks of receiving payment from plaintiff; (2) defendant assured plaintiff that he would have his "day in court" to ask questions of the underlying defendants; and (3) defendant assured plaintiff that he would see the case to the end, but he became "less available" to plaintiff.

¶ 17 Finally, plaintiff asserted a negligence claim. He asserted only that defendant "owed a duty of care to the plaintiff," he "breached such duty," and "defendant's breach of this duty caused the plaintiff damages." In total, plaintiff sought damages in excess of $15,000.

¶ 18 The case was tried on December 12, 2012. The record does not contain a transcript of the proceedings. However, it contains the court's written order, which makes the following findings

and conclusions. Plaintiff paid defendant $5,000 as an agreed lump sum fee for legal services rendered in filing an action challenging the constitutionality of the Act. The complaint was filed in November of 2010. The court reviewed the complaint and "believes that this type of complaint would take several hours to write and the [court] stated that in her experience as a trial attorney, it would take more than 3 full days to write the type of complaint at bar." Defendant's failure to file the complaint within 14 days was "irrelevant" because there was "no specific time frame in a written contract between the parties." Additionally, plaintiff was not adversely affected by the delay in filing the complaint because "this matter is not time sensitive."

¶ 19 The court found that in January of 2011, the Illinois Attorney General filed a motion to dismiss the complaint in the underlying case. Shortly thereafter, the Illinois Appellate Court declared the Act unconstitutional, which made "plaintiff's complaint moot for some time until July of 2011, when [the] Illinois Supreme Court reversed the Illinois Appellate Court."

¶ 20 The court found that plaintiff discharged defendant as his attorney in September of 2011, approximately one week before the hearing on the Attorney General's motion to dismiss the underlying complaint.

¶ 21 The court further found that throughout the trial,

> "[p]laintiff presented irrelevant evidence and made numerous statements that were not relevant to the adjudication of this cause and when advised by this Court that his proposed evidence was irrelevant, [p]laintiff became unruly in court and made various derogatory statements that were improper and which made it necessary for the [c]ourt to take steps to firmly control the plaintiff with the assistance of the

Cook County [s]heriff that was assigned to the courtroom."

¶ 22 Finally, the court noted that there are many cases in which

> "a client (as [p]laintiff) sues his/her attorney (as [d]efendant) because the client is not satisfied with his/her attorney's representation. However, it is this [c]ourt's ruling that it cannot contest nor review [d]efendant's trial strategy that was raised to contest the [c]onstitutionality of the statute at issue and that was used in [d]efendant's legal representation of [p]laintiff. Plaintiff has not proven the elements necessary for a breach of contract."

The court ultimately entered judgment in favor of defendant. Plaintiff now appeals. Defendant did not file a brief on appeal.

¶ 23 ANALYSIS

¶ 24 On appeal, plaintiff's arguments fall into two general categories: he disagrees with the circuit court's exclusion of certain evidence and he believes that the judge was biased against him. As to the admission of evidence, plaintiff specifically argues that the court: (1) did not "accept[ ] more evidence proving [defendant] breached his contract with [plaintiff] by not filing the complaint in a timely manner"; (2) it did "not allow[ ] the motion to dismiss [in the underlying lawsuit] to be entered as an exhibit in the case on the grounds it was irrelevant"; and (3) it "rul[ed] against [admitting] evidence as to why [defendant] was discharged [as plaintiff's counsel]."

¶ 25 Whether to admit or exclude evidence is a decision left to the discretion of the circuit court. *In re Leona W.*, 228 Ill. 2d 439, 460 (2008). The court's ruling on such motions will not

be disturbed on review absent an abuse of that discretion. *Id*. "The threshold for finding an abuse of discretion is high." *Id*. A court's evidentiary ruling will not be deemed an abuse of discretion unless it may be said that no reasonable person would take the view adopted by the court. *Id*. Moreover, even if an abuse of discretion has occurred, we will not reverse the judgment unless "the record indicates the existence of substantial prejudice affecting the outcome of the trial." *Id*.

¶ 26 However, our supreme court has long held that where an appellant has not provided this court with a sufficiently complete record of the proceedings at trial to support his claims of error, we must presume that the orders entered by the trial court conformed with law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). This is especially true when we are being asked to review the circuit court's rationale for deciding whether to admit evidence. It is the appellant's burden to present this court with the materials necessary to review his claims of error. *Id.* at 391. Therefore, we must resolve any doubts that arise from the incompleteness of the record against the appellant. *Id.* at 392.

¶ 27 In this case, plaintiff has not provided us with a transcript of the trial, an agreed statement of facts, or a bystander's report of the proceedings pursuant to Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005). Nor is there any indication that he made an offer of proof of what the excluded evidence would show. Without having some record of what the excluded evidence is or the court's rationale for excluding it, we cannot say whether any reasonable person would have taken the view adopted by the court. *Leona W.*, 228 Ill. 2d at 460. Therefore, there is no basis for holding that the circuit court abused its discretion in excluding certain evidence. *Foutch*, 99 Ill. 2d at 392.

¶ 28 Plaintiff also argues that the court erred in finding that the underlying complaint was moot, thereby negating one of the bases of his legal malpractice claim. "A cause of action is deemed moot if no actual controversy exists or if events occur that make it impossible for the court to grant effectual relief." *Tully v. McLean*, 2013 IL App (1st) 113663, ¶ 16. A moot case "seeks to determine an abstract question or a judgment which when rendered cannot have any practical legal effect on the controversy." *Id.*

¶ 29 Here, while plaintiff's underlying lawsuit was pending, this court declared that the Act was unconstitutional, which is the same relief plaintiff sought. Therefore, there was no operative statute for plaintiff to challenge unless and until the Illinois Supreme Court reversed that decision. The circuit court in this case properly recognized that the court in the underlying lawsuit could not have granted plaintiff the relief he requested and that his complaint was moot.[2]

¶ 30 Plaintiff also argues that the judge was biased against him as evidenced by: (1) her finding that the underlying complaint was well drafted and would have taken several hours to complete; (2) her finding that plaintiff "had to be restrained" at trial; and (3) her comments to plaintiff indicating that he should have hired a lawyer and a court reporter and that his "appeal will not stand." He further argues that the judge should have recused herself pursuant to Canon 3 of the Judicial Code of Ethics.

¶ 31 A trial judge is presumed to be impartial and the burden is on the party alleging bias to overcome this presumption. *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002). The moving party

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[2] After the Illinois Supreme Court reversed this court and found that the Act was constitutional, plaintiff's underlying lawsuit was reinstated and his case proceeded on the merits.

must establish "actual prejudice," either in prejudicial trial conduct or a personal bias, in a petition for substitution of judge for cause under section 2-1001 of the Code of Civil Procedure (735 ILCS 5/2-1001 (West 2010)). *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 30. Section 2-1001(a)(3) provides that a petition for substitution of judge for cause shall be filed "setting forth the specific cause for substitution ***. The petition shall be verified by the affidavit of the applicant." 735 ILCS 5/2-1001(a)(3) (West 2010); *In re Estate of Wilson*, 238 Ill. 2d 519, 553-54 (2010).

¶ 32 The Illinois Supreme Court requires that litigants' petitions strictly comply with the statute's pleading requirements in order to be heard on the merits. *In re Estate of Wilson*, 238 Ill. 2d at 554. That is, to meet the statute's threshold requirements, a petition for substitution of judge must allege grounds that, if true, would justify granting substitution for cause and they must be supported by affidavit. *Id*.

¶ 33 In this case, plaintiff has not complied with the threshold requirements for pleading judicial bias. In his brief, plaintiff represented only that "[d]uring the course of the trial, [he] had determined he was not getting a fair trial and on those occasions asked for a new Judge and was denied." Our review of the record also reveals that he did not file a petition for substitution of judge or an affidavit supporting his claims of bias. Additionally, as we have noted, there is no trial transcript in the record indicating his specific claims of bias or the factual bases for them. Therefore, plaintiff has not satisfied his burden of properly setting forth claims of "actual prejudice" to overcome the presumption that the judge was impartial. Accordingly, the court was justified in denying plaintiff's oral motion. *Id.* at 563 (noting that courts may properly deny a

petition for substitution of judge where it lacked specificity and was not accompanied by an affidavit).

¶ 34 Even if we could address the merits of plaintiff's claims as he has presented them on appeal, we would find them to be without merit. Allegations of judicial bias must be "personal rather than judicial and must stem from an extrajudicial source." *Id.* at 554. That is, the alleged bias must have arisen from some source other than what the judge learned during the course of her participation in the proceedings before her. *Id*. A judge's previous rulings in a particular case "almost never constitute a valid basis" for claims of judicial bias. *Id.* Moreover, a judge's remarks during the course of a trial that are critical or disapproving of, or even hostile to, a party ordinarily will not support a claim of bias unless they demonstrate a "deep-seated favoritism or antagonism" deriving from an extrajudicial source that would make a fair judgment impossible. *Id.*

¶ 35 Here, the conduct plaintiff complains of is not a valid basis for a claim of bias. First, the judge's finding that the underlying complaint was well drafted was an essential part of disposing of plaintiff's legal malpractice claim. Although the decision was unfavorable to plaintiff, that is not evidence of bias. Second, her finding that plaintiff became "unruly in court" and made improper "derogatory statements" to the court, which "made it necessary for the Court to take steps to firmly control the Plaintiff" during the proceedings, arises out of her inherent discretion to control the proceedings in her courtroom. Finally, her comments that plaintiff should have hired an attorney and a court reporter did not show bias, but rather, was well-intended advice. Indeed, many of plaintiff's arguments on appeal could not be addressed because there was no

report of the trial proceedings. Accordingly, plaintiff could not establish that the judge had a "deep-seated favoritism or antagonism that would make a fair judgment impossible." See *In re Estate of Wilson*, 238 Ill. 2d at 554.

¶ 36 For all of the foregoing reasons, we affirm the judgment of the circuit court.

¶ 37 Affirmed.